

extract improper concessions. Hence, there is no demonstrated need to extend the program access or carriage rules.

Moreover, there is no legitimate theoretical basis for extending the rules. The predicate for extension of the program access rules to cable-affiliated DBS operators -- as embodied in competitors' conjectural claims -- has been exposed as baseless by expert economic analysis. Indeed, Dr. Owen concluded that TCI and PRIMESTAR lack the incentive and the ability to engage in anticompetitive vertical foreclosure.⁴² The programming supply market is highly competitive and characterized by a vast number of market entrants, the majority of which have no affiliation with a cable operator.⁴³ Accordingly, neither PRIMESTAR nor its partners have the ability to foreclose competitive access, even if they so desired.

As suggested above, application of the program access rules to PRIMESTAR partners' DBS operations would inappropriately extend the terms of the consent decrees.⁴⁴ Due to the dynamic nature of MVPD competition and the limited grounds for the terms of the decree, the decrees expire by their own terms. The decrees recognized that extensions of their terms beyond a limited period of time could hinder

⁴² See generally November 1994 Owen Declaration at ¶¶ 27-30; November 1995 Owen Declaration at ¶ 4.

⁴³ November 1994 Owen Declaration at ¶ 30.

⁴⁴ The state consent decree expires on October 1, 1997; the federal consent decree expires on April 4, 1999.

artificially the development and growth of programming services. As the Competitive Impact Statement to the federal decree states:

[t]he Department believes that the proposed Final Judgment provides an adequate remedy for the alleged violation and is in the public interest. The term of the proposed Final Judgment is 5 years. This term is shorter than the more typical 10 year term, and reflects the Department's recognition of the major technological changes occurring in the industry, as well as recent legislative changes affecting the subjects of the Proposed Final Judgment.⁴⁵

Hence, consistent with the Justice Department's informed and considered view, the Commission should refrain from taking action that would have the effect of extending access rules when they are no longer justified.

Furthermore, there are compelling reasons why the rules should not be extended. First, application of these rules to DBS operators would reduce the incentives to create new programming for DBS because competitors could "free ride" on other firms' service innovations. Second, the proposed rule would tend to diminish any service and price differentiation among operators' offerings.⁴⁶ In this fashion, the still evolving DBS medium could be reduced to simply another mode of delivery of the same cable programming, rather than a source of unique programming.

⁴⁵ United States v. Primestar Partners L.P., et al. (Civ. Action 93-3913) (S.D.N.Y.) (Competitive Impact Statement (June 9, 1993) at 8-9).

⁴⁶ See November 1995 Owen Declaration at ¶ 4.

D. The NPRM's Proposal to Regulate HITS Service Is Based on a Fundamental Misunderstanding that TCI Intends to or Is Able to "Wholesale Programming."

TEMPO opposes as entirely unnecessary the NPRM's proposal to regulate "the wholesale provision of digitized programming to cable operators and other MVPDs."⁴⁷ The proposal is based on the Commission's basic misapprehension that TCI's proposed "Headend in the Sky" ("HITS") service involves the wholesale provision of programming. This is simply not true. Properly understood, there is no reason to regulate in any manner HITS service.

A brief description of the genesis of HITS and its function may assist the Commission in setting the record straight. HITS was conceived sometime ago as a cost efficient way for TCI to meet its own internal needs to increase cable system channel capacity. Because TCI operates a large number of smaller, rural cable systems that do not have the subscriber base to support an expensive rebuild (*e.g.*, a "hybrid fiber coax" ("HFC") architecture), TCI decided instead to rely heavily on satellite-delivered digitally compressed programming. Hence, TCI built its National Digital Television Center at a cost of more than \$100 million principally to provide its own systems with such compressed programming. TCI also decided to offer its services to other operators in need of an alternative, or adjunct, to HFC. In this fashion, TCI is making available a technology to significantly improve the ability of these operators to provide

⁴⁷ NPRM at ¶ 61.

their subscribers with more competitive services. Indeed, HITS makes it possible for even the smallest systems to deliver a wealth of choice to their subscribers.

The NPRM fundamentally misconstrues the nature of HITS by mistakenly referring to it as the provision of "wholesale DBS service."⁴⁸ The term "wholesale" wrongly presupposes that TCI purchases programming and resells it to operators who in turn retail it to their subscribers. In truth, however, the HITS service will not involve the purchase or control of distribution of the cable programming transmitted through its transponders.⁴⁹

When fully operational, TCI's HITS service will be comprised of two distinct elements, each of which can be purchased separately from other providers: signal transport and authorization. An operator is free to acquire both transport and authorization services from HITS, both from alternative sources, or buy only one from HITS and acquire the other elsewhere.

In short, the NPRM's understanding that HITS is a wholesaler of programming is off the mark. The traditional relationship between cable programmer and operator is not altered; the operator must negotiate a valid affiliation agreement with the programmer in order to resell the programming it receives via HITS. Put simply, any HITS customer must obtain directly from each programmer the right to distribute to its

⁴⁸ NPRM at ¶ 62.

⁴⁹ HITS will use PRIMESTAR's transponders as well as transponders leased from other providers.

subscribers any programming it receives through HITS. Hence, TCI does not control operators' access to the programming and no competitive concerns are implicated. The Commission's professed fear of "vertical foreclosure for the wholesale distribution of programming" is therefore without any legitimate foundation. No new rules are required.⁵⁰

⁵⁰ Indeed, HITS must compete with the transport and authorization services of alternative providers and therefore has no monopoly power. November 1995 Owen Declaration at ¶ 5. Other operators, including DIRECTV, Group W, and Alphastar, have been identified as possible HITS-type providers, and EchoStar/Directsat has specifically represented to the Commission its intent to provide similar services. See "HITS Not the Only Answer," Cablevision, May 22, 1995, at 40, 46; EchoStar Satellite Corp.'s Consolidated Opposition to Applications for Review, File Nos. DBS-94-11EXT/15ACP/16MP, June 6, 1995, at 41. As Dr. Owen recognizes, TCI does not control an essential facility with which it could discriminate or inhibit competition in any manner; DBS and other competitors are free to offer the same competitive transport and authorization services. November 1995 Owen Declaration at ¶ 5. Thus, the NPRM's conjecture that TEMPO might enjoy potential cost advantages from the provision of HITS (NPRM at ¶ 61) -- far from being a matter of regulatory concern -- should be praised as a possible avenue to lower prices to consumers through potential cost savings.

The NPRM also speculates that programmers affiliated with TCI might withhold their consent to permitting other DBS competitors to provide HITS-type service. But programmers affiliated with TCI have every incentive to increase their carriage and penetration by any means necessary, including -- if economically justified -- the purchase of transport services from multiple DBS operators.

IV. TO ENCOURAGE THE PROMPT INTRODUCTION OF NEW DBS SERVICES, THE COMMISSION SHOULD ENABLE U.S. PROVIDERS TO OFFER INTERNATIONAL SERVICE, PROMOTE THE USE OF NON-U.S. LICENSED SPACE STATIONS FOR DOMESTIC PURPOSES, AND SEEK TO MODIFY THE BSS PLAN.

To foster the development of new DBS services, the Commission proposes to permit U.S. DBS licensees to provide international service.⁵¹ TEMPO supports this proposal. The public interest would be served by enhancing the efficiency of orbit/spectrum resources, exporting U.S. produced programming, and improving the U.S. balance of trade.

The Commission is also considering whether to promote the use of non-U.S. satellites to provide domestic U.S. service.⁵² Moreover, the Commission proposes to apply to the ITU to secure additional DBS allocations for U.S. domestic use, a process the Commission recognizes could take from one to several years.⁵³ TEMPO supports the Commission's efforts to enhance the efficient use of orbit/spectrum resources and increase competition by seeking additional U.S. allocations and promoting the use of foreign satellites for domestic DBS services.

TEMPO commends the Commission for proposing to acquire additional orbital slots for the United States from the ITU. Although the Region 2 countries, including

⁵¹ See NPRM at ¶ 24.

⁵² Domestic Fixed Satellites and Separate International Satellite Systems, 10 FCC Rcd 7789, 7797 (1995).

⁵³ NPRM at ¶ 52.

the United States, received their DBS allocations pursuant to the 1983 Regional Administrative Radio Conference ("RARC '83"), foreign DBS capacity in Region 2 has been highly underutilized. Further, new technologies have improved efficiency to such an extent that sub-regional joint ventures are more practical than the nationally-based distribution scheme envisioned by RARC '83. To promote domestic DBS services in light of the availability of resources, therefore, the Commission should take all steps necessary to have additional orbital slots reallocated to the United States.

Tempo respectfully submits, however, that modifying the BSS plan to allocate additional orbital slots to the United States may be a lengthy and contentious process. As the Commission itself has recognized, the ITU modification process certainly will take much longer than one year before any proposed DBS orbital locations are added to the BSS plan and receive all concomitant protection from interference. Additional allocations would then have to be assigned to new applicants, which would further delay the delivery of new service.

The Commission need not wait for the ITU to approve or deny any modifications to the BSS plan, however, before it moves to increase DBS resources available to domestic DBS providers. The Commission can immediately enhance efficiency and improve competition by promoting the provision of domestic U.S. service from non-U.S. licensed space stations in orbital slots allocated to foreign governments.

The Commission should assist U.S. companies in their efforts to acquire or lease channels on non-U.S. licensed space stations that could be used to increase DBS resources and competition without causing interference or breaches of the United States' obligations under RARC '83.⁵⁴ No interference to operating or planned systems of foreign governments would be caused by using channels already allocated to a foreign Region 2 government. Further, use of non-U.S. licensed space stations would not be inconsistent with United States' obligations under RARC '83.⁵⁵ Nothing in the Region 2 plans adopted at the 1979 World Administrative Radio Conference or RARC '83 compels a government to restrict DBS operators using that government's allocated orbital slots to provide only domestic service.⁵⁶ Therefore, the Commission should encourage U.S. providers to arrange for use of foreign satellite resources available to them for domestic U.S. services.

⁵⁴ Should any U.S. companies successfully acquire non-U.S. licensed space segments for DBS use, the Commission could apply, as appropriate, its DBS rules, including any amendments adopted in this proceeding.

⁵⁵ "Deviations from the guidelines . . . of RARC-83 may be permitted with Commission approval provided they do not cause interference to operation or planned systems of other administrations in excess of that specified in the Final Acts of the . . . RARC-83." Direct Broadcast Satellites, 90 FCC 2d at 718.

⁵⁶ See generally Regulatory Policy Regarding the Direct Broadcast Satellite Service, 94 FCC 2d 741, 744, 752 (1983).

V. THE COMMISSION SHOULD VIGOROUSLY REVIEW AND ENFORCE COMPLIANCE WITH MILESTONES THROUGHOUT THE ENTIRE CONSTRUCTION PROCESS.

TEMPO applauds the Commission's efforts to more vigorously enforce DBS permittees' obligations to proceed with due diligence. The Commission should therefore adopt its proposal to require permittees to complete satellite construction within four years.⁵⁷ To ensure the prompt introduction of new service, moreover, the revised standards should be imposed on all existing as well as future permittees.

In addition, the Commission should not adopt a new four-year rule without providing an effective enforcement mechanism applicable throughout the construction process. Thus, the Commission should carefully review semi-annual progress reports and revoke any permit where a permittee has not made any reasonable progress or cannot meet its construction milestones in a timely basis. Otherwise, the public would needlessly be denied service for an additional four years before the Commission took corrective action.⁵⁸

⁵⁷ NPRM at ¶ 27.

⁵⁸ The Commission should also act promptly on the pending applications for extension of the construction deadline for EchoStar/Directsat, Continental Satellite Corp., and Direct Broadcast Satellite Corporation. The possible availability of other spectrum could dramatically affect the value of the spectrum at 110°W and 148°W. Therefore, competitive equity requires the Commission to resolve the other applications before auction so that bidders may fairly evaluate the spectrum.

VI. THE USE OF DBS RESOURCES TO OFFER NON-DBS SERVICES, EXCEPT ON MERELY AN ANCILLARY BASIS, IS CONTRARY TO THE DEVELOPMENT OF A ROBUST DBS INDUSTRY.

In order to foster the development of the DBS industry at a time that the first DBS satellite remained years away from launch, in 1986 the Commission established a policy allowing certain non-conforming uses of DBS capacity, subject to specified safeguards.⁵⁹ The Commission emphasized that temporal requirements would "ensure that non-conforming uses remain ancillary and do not effect a de facto reallocation" of the spectrum, and would "absolutely minimize the possibility of a party applying for DBS facilities with the primary purpose of providing FSS-type services."⁶⁰

In the NPRM, the Commission proposes to permit a DBS operator to devote up to fifty-percent of all its transponders for non-DBS use.⁶¹ Not only is this proposal a waste of scarce resources, it is directly contrary to the Commission's purpose of

⁵⁹ United States Satellite Broadcasting Co., 1 FCC Rcd 977, 979 (1986) (non-DBS service may be offered on an ancillary basis during the first five-year license term, and thereafter, only on those transponders that provide DBS service, up to a maximum of 50% of the time). In 1991, the Commission affirmed its policies for non-DBS uses and found no need to permit any additional latitude for use of DBS satellites at western orbital locations. Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, 6 FCC Rcd 2581, 2581 (1991).

⁶⁰ USSB, 1 FCC Rcd at 979.

⁶¹ NPRM at ¶ 30.

allowing DBS spectrum to be used for nonconforming purposes only to foster the development of DBS.⁶²

The Commission effectively announced in the Advanced Order that the "pioneering era" of DBS was over.⁶³ Indeed, as justification for abandoning its reallocation policies, the Commission notes that "DBS service is available from two permittees (DIRECT and USSB)," which have "proven the feasibility of digital compression and provision of full-CONUS service." NPRM at ¶ 10. Both DIRECTV and USSB have been able to succeed by providing a full complement of DBS service. The Commission also recognizes that because of the great need for DBS spectrum, it is proposing to seek additional DBS allocations from the ITU and to permit non-U.S. satellites to be used to provide domestic U.S. DBS service.⁶⁴ As a result, it would be irrational for the Commission to deny ACC's extension application and call for significant changes in its policies and regulations on the grounds of need for additional

⁶² Indeed, MCI, one of the most forceful proponents of auctioning the frequencies at 110°W, may be primarily interested in using the full-CONUS slot to provide non-DBS services, such as "transmit[ting] large amounts of data to the personal computers of customers and employees." See "MCI Hoping to Enter Satellite TV Market," Washington Post, Sept. 25, 1995, at D1. According to Susan Mayer, MCI senior vice president, "MCI wants to deliver a whole range of [advanced communications] services. These are the products our customers are asking for.'" Id.

⁶³ Advanced Order at ¶ 24.

⁶⁴ NPRM at ¶¶ 24, 52.

DBS spectrum, then permit one-half of DBS spectrum to be used for non-DBS purposes.⁶⁵

VII. THE COMMISSION SHOULD PROMOTE THE MAXIMUM NUMBER OF FULL-CONUS DBS SERVICES BY RESERVING THE 148°W ORBITAL SLOT FOR PERMITTEES WITH ALLOCATIONS AT 61.5°W.

Maximizing the number of full-CONUS systems has been a paramount goal of the Commission's DBS regulatory policies. Full-CONUS service provides U.S. consumers with the benefits of competition and increased service, and facilitates the construction of competitively viable systems by enabling all operators to reach the entire population. Thus, in 1989 the Commission adopted its policy of allocating spectrum only in east-west pairs to ensure that operators provided the maximum number of full-CONUS channels.⁶⁶

In the NPRM, the Commission proposes to eliminate its east-west pairing scheme and therefore auction the frequencies at 148°W without requiring the frequencies to be paired with eastern allocations so that full-CONUS service can be assured.⁶⁷ In this regard, the Commission also proposes to include the 61.5°W orbital

⁶⁵ TCI's "Headend in the Sky," which will provide DBS programming to cable headends for redistribution to individual subscribers, will not consume any satellite resources that would otherwise be used for direct-to-home delivery and is fully consistent with the definition of DBS service. Consolidated Reply of TEMPO DBS, Inc., DBS-94-11EXT/15ACP/16MP, filed June 16, 1995, at 35; see Section II.D, supra.

⁶⁶ Continental, 4 FCC Rcd at 6292.

⁶⁷ NPRM at ¶ 65.

location as "being capable of full-CONUS service" for purposes of the Commission's proposed spectrum limitations.⁶⁸ Because of continued uncertainty regarding the technical capabilities of satellites located at 61.5°W, TEMPO submits that the proposed auction of the channels at 148°W would directly frustrate the goal of promoting full-CONUS service. Therefore, those channels should be reserved for use by permittees with allocations at 61.5°W instead of auctioned to ensure the development of a fourth truly competitive full-CONUS service.

TEMPO submits that it is premature at best to find that 61.5°W can provide full-CONUS service with the same level of quality as the other eastern allocations. The "look angle" from 61.5°W is so severe that service to the far western United States may not be reliable. Moreover, satellites located at 148°W, the closest of the four western orbital locations to the United States, cannot see all of the eastern half-CONUS.⁶⁹ Thus, only reserving the western slot, 148°W, that provides the best service to the western half-CONUS, for use with 61.5°W will ensure the public receives a fourth truly competitive full-CONUS service. Therefore, to promote competition among viable DBS systems, the Commission should retain its paired slot policy for permittees at 61.5°W and reserve 148°W for their use.

⁶⁸ *Id.* at ¶ 44.

⁶⁹ The other three slots, which are farther to the west, 157°W, 166°W, and 175°W, are better positioned to provide international, rather than domestic, service.

The Commission previously has considered proposals to reserve 148°W for use by permittees at 61.5°W to promote the development of full-CONUS systems. In 1991, for example, the Commission recognized that unrestricted use of western orbital locations "could discourage, rather than encourage, growth of DBS, particularly if western locations are necessary for nationwide coverage in the long run," but rejected a rule then as beyond the scope of that particular proceeding.⁷⁰ Subsequently, the Commission refused to pair assignments at 61.5°W and 148°W, because it would have required rearranging prior allocations, potentially subjecting the holders of those allocations to inconvenience and expense.⁷¹

In this proceeding, however, the Commission is able to reallocate the channels vacated at 148°W by pairing them with the allocations at 61.5°W, without resulting in any inconvenience or cost to any party. In fact, instituting this pairing policy now would likely result in the quickest deployment of a new full-CONUS service by enabling the permittees at 61.5°W immediately to collocate 24 of their western channels at a single orbital slot, which is also best suited for western half-CONUS

⁷⁰ Potential Uses of Certain Orbital Allocations by Operators in the Direct Broadcast Satellite Service, 6 F.C.C. Rcd 2581, 2581, 2581 n.9. (1991) (responding to concerns that operators assigned to 61.5°W may be blocked out of the full-CONUS market if 61.5°W is not paired with 148°W).

⁷¹ See Tempo Satellite, Inc., 7 F.C.C. Rcd 6597, 6599 (1992) (declining to pair 148°W and 61.5°W because it would disrupt the allocations and expectations of other DBS applicants); Advance Communications Corp., 6 F.C.C. Rcd 6977, 6978 (1991) (rejecting pairing because it would require withdrawing assignments made to other permittees without adequate justification).

service. The proposed policy would significantly enhance the technical capability of their systems and promote investment in new DBS service.

Thus, the Commission should grant the permittees at 61.5°W the option to exchange 24 of their existing western allocations for 148°W.⁷² This action would not be inconsistent with a desire to raise revenue because the vacated western channels could be reallocated through auction. TEMPO submits, however, that the public benefit to the domestic U.S. population derived from a fourth competitive full-CONUS service would far outweigh any short term benefit of a one-time payment to the federal treasury for channels that, because of their inability to provide service to the eastern half-CONUS, would most likely be used for some form of international service.

VIII. DBS PROVIDERS SHOULD BE REQUIRED TO PROVIDE SERVICE TO ALASKA AND HAWAII FROM ALL TECHNICALLY FEASIBLE ORBITAL LOCATIONS.

In the NPRM, the Commission tentatively concludes that a service requirement for Alaska and Hawaii may be necessary because "it is unclear whether any permittee will provide service to these states in the near future."⁷³ Ironically, the Commission now finds a regulatory requirement is necessary to ensure service to Alaska and Hawaii

⁷² The other eight channels at 148°W, currently allocated to USSB, could be reassigned to the permittees at 61.5°W when and if they become available for reassignment.

⁷³ NPRM at ¶ 68. Neither DIRECTV/USSB nor EchoStar/Directsat has designed antennas to provide service to these states.

only eleven days after rejecting a market-based approach that would have offered service to these states next summer. Thus, the satellites TCI would have made available to ACC to complete its system at 110°W were specifically designed to provide Alaska and Hawaii service. By rejecting the ACC/TEMPO transaction, these states may not see service until the beginning of the next millennium, thus paradoxically justifying a new government rule.

Notwithstanding the Commission's refusal to permit ACC to provide service, TEMPO, consistent with its longstanding intent to provide DBS service to all states, supports a requirement that all technically capable permittees provide Alaska and Hawaii service. TEMPO suggests, however, that not just each future provider, but each present permittee, be required to offer service to Alaska and Hawaii from at least one of its authorized orbital locations technically capable of such service. Thus, to ensure the quickest service possible, the Commission should require all satellites that have not yet been launched, including those now under development or to be flown as replacements, meet this requirement. In that way, the citizens of Alaska and Hawaii, as well their counterparts in the contiguous United States, can benefit soon from all the high quality DBS services capable of reaching them, just as ACC and TEMPO were prepared to offer next summer.

IX. THE REALLOCATION OF CHANNELS AT 110°W AND 148°W MUST BE EXPRESSLY CONDITIONED ON THE OUTCOME OF THE APPEALS OF THE ADVANCED ORDER.

The Commission has proposed an ambitious schedule for reallocating the DBS spectrum at 148°W and 110°W through auction. Accordingly, despite efforts by TEMPO and PRIMESTAR to obtain expedited treatment of their appeals of the Advanced Order, the Commission may attempt to auction the frequencies prior to the completion of appellate review. Therefore, in order to dispel any uncertainty among the bidding parties, the Commission must expressly condition any authorization issued to a successful third party bidder on the disposition of the appeal of the Advanced Order. As a result, a successful bidder must proceed with construction of a system at its own risk. A condition of this nature is consistent with precedent.⁷⁴

Moreover, all sums paid by a successful bidder, including TEMPO or PRIMESTAR, at auction must be refundable if the Advanced Order is reversed. No party should be required to make payment to the government in the event the appeals are successful and ACC's authorizations are lawfully restored.

X. CONCLUSION

By rejecting the ACC/TEMPO transactions, the Commission delayed new DBS service to the public for several years, contrary to its longstanding goal. With the

⁷⁴ Directsat Corp., 8 FCC Rcd 7962, 7964 n.5, 7965 (1993).

NPRM, the Commission could compound the delay by adopting, without any empirical or theoretical support, onerous restrictions on the ability of non-DBS MVPDs to provide new service to the public. The proposed rules are premised merely on obviously self-interested statements of TEMPO's and PRIMESTAR's opponents (one of which, DIRECTV, is controlled by the nation's largest corporation), who merely desire to shackle or eliminate entirely a strong competitor, and should be rejected.

The public will be best served by unfettered competition among numerous DBS providers. The Commission should facilitate an open market and reject the proposed cross-ownership and service restrictions, which would only delay service and inhibit the development and growth of new service and program offerings. To the extent any structural or service rules are imposed, however, competitive equity and rational policy making require they be applied equally to all DBS operators.

Respectfully submitted,

TEMPO DBS, INC.

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November 20, 1995

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:
Revision of
Rules and Policies for the
Direct Broadcast Satellite
Service



IB Docket No. 95-168
PP Docket No. 93-253

Declaration of Bruce M. Owen

1. I am an economist and president of Economists Incorporated, an economic consulting firm located at 1233 20th Street, N.W., Washington, D.C. 20036. I am also a visiting professor of economics at Stanford University's Washington, D.C. campus. I hold a Ph.D. in economics from Stanford University (1970) and a B.A. in economics from Williams College (1965). My fields of specialization are applied microeconomics and industrial organization, especially antitrust economics and regulation of industry. I have published a number of books and articles in these fields, including "*United States v. AT&T: The Economic Issues*" (with R. Noll, in J. Kwoka and L. White, eds., *The Antitrust Revolution*, Scott, Foresman, 2nd ed., 1994), *Video Economics* (with S. Wildman, Harvard University Press, 1992), and *The Regulation Game* (with R. Braeutigam, Ballinger, 1978). I have taught economics as a full-time member of the faculties of Duke University and Stanford University. From 1979 to 1981 I was the chief economist of the Antitrust Division of the United States Department of Justice. During 1971-1972 I was the chief economist of the White House Office of Telecommunications Policy. I have testified in a number of antitrust and regulatory proceedings, including ones relating to market

definition, market foreclosure, predatory pricing and video economics. A copy of my curriculum vitae is attached to this declaration.

2. I have been asked by TEMPO DBS, Inc. ("TEMPO"), which is a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI") to address the economic issues articulated in the Notice of Proposed Rulemaking in this proceeding ("NPRM"). Previously I had filed two declarations analyzing the economic issues raised by TEMPO's application to acquire Advanced Communications Corporation's direct broadcast satellite ("DBS") authorizations (FCC File No. DBS-84-01/94-15-ACP), and to consider allegations made in various Petitions to Deny by existing and potential DBS competitors that that assignment would result in competitive harm. These earlier declarations are attached to this declaration.
3. My analysis and conclusion that participation in the DBS marketplace by TEMPO and PRIMESTAR Partners L.P. ("PRIMESTAR"), a direct satellite-to-consumer video service provider whose partners include six cable operators, including TCI, and GE American Communications, Inc. is pro-competitive have not changed from my previous declarations filed with the Commission. Indeed, those conclusions have only been strengthened by subsequent events. In my earlier analysis I pointed out that TEMPO and PRIMESTAR faced competition in the near future from the video dialtone ("VDT") services provided by telephone companies. While it remains unclear exactly what mode of entry into the provision of video services telephone companies will employ, their intent to enter seems stronger than ever.
4. As pointed out in my earlier declarations, there is no sound economic basis for any concern that TEMPO or PRIMESTAR have the ability and/or the incentive to engage in anti-competitive vertical foreclosure by denying DBS competitors access to PRIMESTAR-affiliated programming. These conclusions can be generalized. There is no need for new program access or program carriage rules applied specifically to DBS services or DBS service providers vertically integrated into video programming (NPRM at ¶¶ 57-60). Not only is there no demonstrated need for such rules, there are substantial risks that rules specific to

vertically-integrated DBS providers would reduce the incentives to create new programming for DBS services and restrict competition among DBS providers to differentiate their services with respect to service, price and program offerings.

5. No legitimate competitive concerns are raised by TCI's planned "Headend in the Sky" or "HITS" service (NPRM at ¶¶ 61, 62). It should be recognized that HITS is not wholesale DBS service. Rather HITS is the provision of transport and authorization services to program providers and/or to multichannel video programming distributors ("MVPDs") using DBS facilities. Programmers or MVPDs would buy these services and in turn be able to offer delivered programming. As is recognized by the Commission in the NPRM at ¶ 61, HITS offers the potential for substantial efficiencies. But the provision of HITS is not a monopoly. It will have to compete with alternative methods of performing the same services, and any DBS provider can offer such service. In particular, TCI has no essential facility over which it could discriminate or inhibit competition.

I declare under penalty of perjury that the foregoing is true and correct.



Bruce M. Owen

November 20, 1995

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:
Application for Consent to
Assignment of DBS Construction
Permit from Advanced
Communications Corporation to
TEMPO DBS, Inc.



DBS-84-01/94-15 ACP

Declaration of Bruce M. Owen

I. Qualifications

1. I am an economist and president of Economists Incorporated, an economic consulting firm located at 1233 20th Street, N.W., Washington, D.C. 20036. I am also a visiting professor of economics at Stanford University's Washington, D.C. campus. I hold a Ph.D. in economics from Stanford University (1970) and a B.A. in economics from Williams College (1965). My fields of specialization are applied micro-economics and industrial organization, especially antitrust economics and regulation of industry. I have published a number of books and articles in these fields, including "*United States v. AT&T: The Economic Issues*" (with R. Noll, in J. Kwoka and L. White, eds., *The Antitrust Revolution*, Scott, Foresman, 2nd ed., 1994), *Video Economics* (with S. Wildman, Harvard University Press, 1992), and *The Regulation Game* (with R. Braeutigam, Ballinger, 1978). I have taught economics as a full-time member of the faculties of Duke University and Stanford University. From 1979 to 1981 I was the chief economist of the Antitrust Division of the United States Department of Justice. During 1971-1972 I was the chief economist of the White House Office of Telecommunications Policy. I have testified in a number of antitrust

and regulatory proceedings, including ones relating to market definition, market foreclosure, predatory pricing and video economics. A copy of my curriculum vitae is attached to this declaration.

II. Introduction and Summary

2. I have been asked by TEMPO DBS, Inc. ("TEMPO"), which is a wholly-owned subsidiary of Tele-Communications, Inc. ("TCI") to address the economic issues raised by its application to acquire Advanced Communications Corporation's ("Advanced") direct broadcast satellite ("DBS") authorizations, and to consider allegations made in various Petitions to Deny by existing and potential DBS competitors that the assignment would result in competitive harm. It is my understanding that TEMPO has agreed to extend an option to lease satellite capacity at the acquired orbital assignment to PRIMESTAR Partners, L.P. ("PRIMESTAR"), a direct satellite-to-consumer video service provider whose partners include six cable operators, including TCI, and GE American Communications, Inc. ("GE"). PRIMESTAR currently utilizes capacity on GE's K-1 satellite, a medium power Ku band satellite, which requires larger and more expensive subscriber reception dishes than a high power DBS satellite which will be employed at the orbital slot which is subject to the application.
3. For purposes of this declaration I have focused on the economic incentives and market structure issues relevant to an analysis of the economic issues raised by the Petitions to Deny. I have thus ignored the safeguards provided by the PRIMESTAR and Liberty/TCI consent decrees, the 1992 Cable Act and related Commission regulations, the conditions in the Commission Order granting TEMPO's license, and the ordinary operation of the antitrust enforcement authorities.
4. I have concluded that the smallest possible relevant product market in which to analyze the issues raised by the application is the market for multichannel video program distribution ("MVPD market" or "video market"). While not every medium is available to every consumer, participants in the video market, especially in the time frame relevant to the analysis, include cable television operators, DBS providers, telco

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video services such as dialtone ("VDT"), multichannel multipoint distribution service ("MMDS") providers, television receive-only ("TVRO") satellite program distributors, Satellite Master Antenna Television ("SMATV") providers, and perhaps, in the future, Local Multipoint Distribution Service (LMDS) providers. The application will promote competition in the video market because it will permit PRIMESTAR to have adequate capacity to compete effectively as a DBS provider.

5. Among the arguments raised by the petitioners to deny the assignment is that PRIMESTAR will fail to promote its services in areas where its cable operator partners have franchises. These arguments are unsound. The petitioners have not correctly analyzed PRIMESTAR's incentives in employing a high power DBS system and the competitive realities and constraints PRIMESTAR will face in the future as a DBS provider. Moreover, if these arguments were correct, the petitioners, PRIMESTAR's DBS competitors, would *benefit* from the alleged diminished competition. If their analysis were sound, their self-interest would dictate silence or support for the assignment. Instead, their opposition is strong evidence that the application is pro-competitive.
6. Petitioners' assertions that TCI could utilize anti-competitive pricing strategies to drive competing DBS suppliers from the market are also without economic merit. Predatory pricing is extremely rare. Typically there is no way that a firm engaging in predatory pricing can hope to recoup the costs of such a strategy. In the video market it is highly unlikely that TCI or PRIMESTAR could engage in successful predation because of the nature of the competition they face and the staying power of existing and expected competitors.
7. Finally, petitioners' claim that the proposed transaction between TEMPO and Advanced could harm PRIMESTAR's DBS competitors through vertical market foreclosure by denying them access to PRIMESTAR-affiliated programming has no basis because it fails to recognize that granting the application would not materially affect the ability of PRIMESTAR's cable partners to foreclose competing DBS providers. The fact that DirecTV and USSB have licensed popular pro-

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grams from suppliers in which PRIMESTAR's cable operator partners have ownership interests demonstrates that PRIMESTAR's partners lack the incentive and/or the ability to deny programming for anti-competitive gain. Furthermore, TCI and PRIMESTAR have no ability to engage in anti-competitive vertical foreclosure. A large number of existing and new program services unaffiliated with PRIMESTAR's partners is available for competing DBS providers.

III. Market Definition

8. To analyze the issues raised by the application, it is necessary to define properly the relevant antitrust market that is affected by the application. A group of products or services and an associated geographic area constitutes an antitrust market if it is the smallest set of products and the smallest area capable in principle of being profitably monopolized. In other words, if one assumed that a hypothetical single supplier controlled the supply of all the products in question, and if that firm could increase its profits by raising prices significantly above competitive levels, then an antitrust market has been defined. However, if a price increase by a hypothetical single supplier would be unprofitable because consumers would switch in significant numbers to other products, then the market has been defined too narrowly for antitrust analysis.
9. The application at issue involves the assignment of the permit to construct a DBS system from Advanced to TEMPO. TEMPO in turn plans to lease all of its capacity at the acquired channels to PRIMESTAR which will offer DBS services on TEMPO's high power satellites. PRIMESTAR's existing satellite will expire in 1996. Assuming the application is approved, PRIMESTAR will not be moving its operations to TEMPO's new satellites until mid-1996 at the earliest. As a result, the application will not affect PRIMESTAR's operations, or competition, until then.
10. When PRIMESTAR moves to TEMPO's high power satellites in mid-1996, it will face several existing DBS competitors already on high power satellites. These competitors will have already been able to mar-

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